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13 *Toshiba America, Inc., Toshiba America*

14 *Information Systems, Inc., and Toshiba America*

15 *Electronic Components, Inc.*

16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 (SAN FRANCISCO DIVISION)

19 IN RE: CATHODE RAY TUBE (CRT)
20 ANTITRUST LITIGATION

Case No. 07-5944 SC
MDL No. 1917

21 This Document Relates to
22 Case No. 13-cv-1173-SC (N.D. Cal.)

23 SHARP ELECTRONICS CORPORATION;
24 SHARP ELECTRONICS MANUFACTURING
25 COMPANY OF AMERICA, INC.,

26 Plaintiffs,

27 v.

28 HITACHI, LTD., *et al.*,

Defendants.

**THE TOSHIBA DEFENDANTS'
MOTION FOR LEAVE TO FILE
SUPPLEMENTAL REPLY IN
SUPPORT OF THEIR AMENDED
MOTION TO DISMISS SHARP'S
COMPLAINT**

REDACTED VERSION OF DOCUMENT SOUGHT TO BE SEALED

THE TOSHIBA DEFENDANTS' MOTION FOR LEAVE TO FILE SUPPLEMENTAL
REPLY IN SUPPORT OF THEIR AMENDED MOTION TO DISMISS SHARP'S COMPLAINT

Case No. 07-5944 SC
MDL No. 1917

NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Defendants Toshiba Corporation, Toshiba America, Inc., Toshiba America Information Systems, Inc., and Toshiba America Electronic Components, Inc. (the “Toshiba Defendants”) hereby move the Court for an order granting the Toshiba Defendants leave to file their Supplemental Reply in Support of Their Amended Motion to Dismiss Sharp’s Complaint.

This motion is based upon this Notice of Motion and Motion, the Memorandum of Points and Authorities in support thereof, and such other materials and information that the Court may properly consider.

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MEMORANDUM OF POINTS AND AUTHORITIES

The Toshiba Defendants, by and through their undersigned counsel, hereby respectfully submit this Memorandum in Support of their Motion for Leave to File Supplemental Reply in Support of the Toshiba Defendants' Amended Motion to Dismiss Sharp's Complaint ("Motion for Leave"). As reflected in the Toshiba Defendants' proposed supplemental reply — attached hereto as Exhibit A — the Toshiba Defendants seek leave as required under Civil Local Rule 7-3(d) to file a supplemental reply to bring new factual evidence to this Court's attention in ruling on the Toshiba Defendants' Amended Motion to Dismiss Sharp's Complaint.

Good cause exists for permitting the supplemental reply because it is limited to admissions made by the Sharp Plaintiffs in interrogatory responses — attached as Exhibit 1 to the proposed supplemental reply — which were served *after* the briefing on the Toshiba Defendants' motion to dismiss was completed.

On November 6, 2013, the Sharp Plaintiffs filed their Opposition to the Toshiba Defendants' Motion to Dismiss. *See* Dkt. No. 2195. In it, the Sharp Plaintiffs make several factual assertions in an attempt to distance themselves from their ultimate parent company, Sharp Corporation, for purposes of avoiding the BTA's forum-selection clause. *See, e.g., id.* at 1 ("Sharp Corporation is not a party to this lawsuit and none of the claims at issue are for Sharp Corporation purchases from Toshiba Corporation."), 2 ("The BTA relates only to domestic Japanese transactions between Toshiba Corporation and Sharp Corporation. The claims here, by contrast, arise out of purchases of CRTs or CRT Products made by the Sharp Plaintiffs solely in the United States.").

On December 18, 2013, the Toshiba Defendants filed their final brief on their motion to dismiss. *See* The Toshiba Defendants' Amended Notice of Motion and Motion to Dismiss Sharp's Complaint, Dkt. No. 2274.

Two days later, on December 20, 2013, the Sharp Plaintiffs served their Responses and Objections to Defendants MT Picture Display Co., Ltd. and LG Electronics USA, Inc.'s First Set of Interrogatories. In the responses, [REDACTED]

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1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 The Sharp Plaintiffs' effort to have it both ways, *i.e.*, to divorce themselves from
5 Sharp Corporation to avoid the BTA's forum-selection clause and [REDACTED]
6 [REDACTED], is relevant to this
7 Court's consideration of the pending motion.

8 District Courts are "accorded substantial flexibility in evaluating a *forum non*
9 *conveniens* motion" and may consider materials outside the pleadings. *See Van*
10 *Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (citing *Piper Aircraft Co. v. Reyno*, 454
11 U.S. 235, 249 (1981)) (noting that affidavits will frequently be considered in ruling on
12 *forum non conveniens* motions); *see also Ioannidis/RIGA v. M/V Sea Concert*, 132 F. Supp.
13 2d 847, 852 (D. Or. 2001) ("Therefore, in reviewing [defendant's] Motion to Dismiss based
14 on the forum selection clause and *forum non conveniens* doctrine, the court need not accept
15 the pleadings as true and may consider facts outside the pleadings.").

16 The Sharp Plaintiffs will not be prejudiced should the Court grant the Toshiba
17 Defendants' Motion for Leave to File because the factual information in the supplemental
18 reply is limited only to Sharp's own statements offered in this case. As such, there is no
19 unfair surprise to the Sharp Plaintiffs. *See Cambridge Elecs. Corp. v. MG Elecs., Inc.*, 227
20 F.R.D. 313, 323-24 (C.D. Cal. 2004) (finding unfair surprise to defendants when plaintiffs
21 included factual material in its opposition to a motion for summary judgment which was not
22 included in prior discovery responses and which was central to plaintiffs' liability theories).
23 Because the Sharp Plaintiffs included extra-Complaint factual information about Sharp
24 Corporation in its Opposition, they should not be heard to complain that this Court should
25 not consider their other factual assertions about the relationship between Sharp Corporation
26 and the Sharp Plaintiffs.

1 For these reasons, this Court should grant the Toshiba Defendants' Motion for Leave
2 to File a Supplemental Reply.

3
4 Dated: January 13, 2014

Respectfully submitted,

WHITE & CASE LLP

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6 By: /s/ Lucius B. Lau

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Corporation, Toshiba America, Inc.,
Toshiba America Information Systems,
Inc., and Toshiba America Electronic
Components, Inc.*

CERTIFICATE OF SERVICE

On January 13, 2014, I caused a copy of “THE TOSHIBA DEFENDANTS’ MOTION FOR LEAVE TO FILE SUPPLMENTAL REPLY IN SUPPORT OF THEIR AMENDED MOTION TO DISMISS SHARP’S COMPLAINT” to be electronically filed via the Court’s Electronic Case Filing System, which constitutes service in this action pursuant to the Court’s order of September 29, 2008.

/s/ Lucius B. Lau

Lucius B. Lau

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